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Book Reviews

INSURANCE AND PUBLIC POLICY. By Spencer L. Kimball: University of Wisconsin Press, 1960. Pp. xii, 387. \$6.00; augmented edition, \$7.50.

The main fault in this excellent book is its misleading title. First, the book is about the growth and development of the insurance institution *in Wisconsin*. A reader expecting a less localized discussion will be disappointed. This is not to say that generalizations cannot be drawn from the Wisconsin experience (Professor Kimball draws them adeptly), but only to say that the title implies a broader base of data than is present.

Second, the words "public policy" need some explanation. The book professes to adopt

. . . a point of view which regards the law as instrumental in character. It sees the law as a system that takes its initial premises from the life of society outside the law and it ultimately justifies legal decision¹ in terms of the social goals and moral standards. . . .²

But sometimes the only "initial premises" discussed are those clearly enunciated in judicial opinions.³ Sometimes the motivation behind legislation that failed of enactment is revealed, but not that behind the opposition.⁴ At other times large globs of legislation are summarized without comment. And, occasionally, Professor Kimball assumes that judges, legislators and administrators are all moved by identical forces "of society outside the law," an assumption which has never been proved, to say the least. What the words "public policy" apparently attempt to convey is this: *major* legal events—e.g., court decisions, new legislation, administrative rulings and enforcement activities—are viewed against a background of the then existing development of society in general and of the insurance institution in particular; they are viewed, that is to say, in the context of society rather than in an isolation booth. The book fulfils the promise of its title, so understood, admirably.

As a work on insurance law, it has so many substantial merits that a reviewer can scarcely do more than cite those parts that especially appealed to him. The detailed account of the legislature's regulation of agents' commissions, and the reasons for it, is fascinating.⁵ The section entitled "The Development of Adminis-

1. Professor Kimball uses the word "decision" in a broader sense than is customary among lawyers. As used in the above quotation, it means a conscious choice by a court, a legislature, or an administrative officer. See pp. 311-14.

2. Pp. 5-6.

3. *E.g.*, pp. 238-39.

4. *E.g.*, p. 239 at n. 27.

5. Pp. 167-72.

trative Control"⁶ is an excellent history of the growth in power, influence and effectiveness of the independent insurance commissioner. A fine case history of legislative proposal and judicial disposal is presented in the review of Wisconsin's "direct-action" statute.⁷ Of particular interest to Missouri lawyers, who also must work under such a law,⁸ is the summary of the forces compelling enactment of, and subsequent efforts to abolish, the pioneer "valued-policy" statute.⁹

As a work on legal history, the book is valuable, and, so far as I know, unique. Commentaries on the running feud over reserve requirements between the State Farm Mutual Insurance Co., headed by a former Wisconsin insurance commissioner, and the legislature,¹⁰ and on the contributions insurance litigation made to the dogma of the federal power-states' rights controversy¹¹ are themselves as palatable arguments for the study of legal history as could be imagined.

The only quibble I have is that the book is sometimes too highly organized by topics. Item: "Financial Provision for the Insurance Department," beginning on page 177, is really a discussion of the limitations on effective action imposed by economy-minded legislatures during the century 1850-1950. "The Growth of Administrative Discretion," beginning on page 187, then returns to 1850 and retraces the entire century, and once again the discussion centers on obstacles in the commissioner's path to effective action. Item: The harshness of the "moral hazards" clause during the 1930's is deprecated on page 232 under the heading "The Standard Fire Policy." But then on pages 239-40, under the heading "Other Proposed Reforms," we learn that its effects were ameliorated by a 1929 statute. So unless a reader has either the time to digest the book at one sitting or the power of total recall, he may find it difficult to visualize everything that was happening at any given point in time.

But this is only a quibble. Insurance lawyers will find here the *raison d'être* of many regulations under which they operate. Those who enjoy legal history will find a systematic and coherent effort to relate "the law" to the humdrum events of life. Laymen and lawyers alike should be pleased by the clear, direct writing. This is, as I said at the beginning, an excellent book.

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6. C. 4, § 4.

7. Pp. 219-22.

8. §§ 379.140-.160, RSMo 1959.

9. Pp. 240-49.

10. Pp. 151-53.

11. Especially pp. 270-80.

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GENERAL PRINCIPLES OF CRIMINAL LAW. By Jerome Hall. Indianapolis: Bobbs-Merrill Company, 1960. Pp. xii, 642. \$9.50.

Professor Jerome Hall, now a "distinguished service" professor of law at Indiana University, has made important scholarly contributions in the fields of criminal law, criminology, and jurisprudence, partly by books¹ and partly by law review articles. This new edition of a book that first appeared in 1947 is not in the nature of a mere revision and streamlining of the previous text, but a rewrite thereof, eliminating certain parts, making substantial additions, and changing the organization of the material included. There has not, however, been a change of the scholarly purpose of the book and of the manner of presentation applied therein. Practically the same analytical and critical propositions of the distinguished author are set forth in this edition as were announced in the first one. His manner of presentation has remained a mixture of purely theoretical discussions, highly erudite but of hardly any interest for the practitioner, and of critical and reform ideas that are not only of academic, but also of great pragmatic importance. It is to be regretted that the English Homicide Act of 1957, which marks a significant departure from certain traditional theories of Anglo-American criminal law,² is only incidentally and superficially mentioned in this otherwise deeply penetrating study.

Although it contains several criminological comments and various reform proposals, the book is mainly devoted to an exploration of the general theory of criminal law. Professor Hall, using a peculiar terminology, subdivides into "doctrines" and "principles," the "general principles" referred to in the title. He excludes from the scope of coverage the specific parts of the penal law, such as definitions of the various crimes and punishments attached to them which he calls "rules." He calls "doctrines" such propositions as those concerned with infancy, insanity, mistake of fact, criminal attempt, and the like, and he calls "principles" such overall propositions of the widest generality as the requirement of legality and the conception of "mens rea." However, the latter term, forming a cardinal point of his theory, is used by him not in a terminological, but in a substantive sense, and thus given a different meaning from the traditional one. And related thereto is the meaning which he gives to the term "recklessness."

It is impossible to state in few words what Professor Hall in an elaborate scholarly discussion, running through a great portion of the book, expounds as the allegedly correct meaning of "mens rea." With this apologetic reservation, the gist of his theory may be described as follows. The requirement of "mens rea" in addition to the criminal act or, technically speaking, the "corpus delicti," is not a matter depending on the given criminal law of a state, and can thus not

1. THEFT AND SOCIETY (2d ed. 1935); GENERAL PRINCIPLES OF CRIMINAL LAW (1947); CASES AND READINGS ON CRIMINAL LAW AND PROCEDURE (1949); READINGS IN JURISPRUDENCE (1938); LIVING LAW OF A DEMOCRATIC SOCIETY (1949); STUDIES IN JURISPRUDENCE AND CRIMINAL THEORY (1958).

2. Koessler, *Comparative Aspects of the English Homicide Act of 1957*, 25 Mo. L. REV. 107-54 (1960).

properly be dispensed with by creating criminal liability in the nature of strict liability. Rather, the kind of natural law proposition of the learned author is that "mens rea" is an intrinsic requirement of genuine or true criminality since it marks that unethical character of an act, not to be confused however with lack of morality in terms of general ethics, which intrinsically distinguishes an act that may be considered as criminal from an improper, yet not criminally punishable act. He moreover believes that awareness of the risk of harm involved in the act is necessary to create that intrinsic criminality, and that therefore only intention and recklessness can satisfy the requirement of "mens rea," but not mere negligence. In his opinion recklessness is not merely a higher degree of negligence, but, for purposes of criminality, different in kind from negligence and closer to intention than to negligence, though he seems to reject³ the splitting up of recklessness into what German scholars respectively call *dolus eventualis* and conscious negligence,⁴ the second being the situation where the perpetrator is aware of the risk of the harm, but assumes that it will not be caused by his act, the first being the situation where, foreseeing the possibility of the harm, though not intending it, he does not care of whether or not it is going to be created by his act.⁵ Professor Hall believes that the Anglo-American law is wrong, in expressly recognizing strict liability in certain criminal offenses, as for instance bigamy according to the rule in a majority of the American jurisdictions,⁶ in practically recognizing strict liability by using the "reasonable man" test, as in the matter of self defense,⁷ and in construing certain statutes, especially those involving so called welfare offenses, as creating strict criminal liability. He rejects as unsound the felony-murder doctrine, abolished in England by the Homicide Act of 1957,⁸ and the similar misdemeanor-manslaughter rule. And he believes that strict liability under statutes creating so called welfare offenses should be construed as a kind of civil rather than as genuine criminal liability.⁹

The reviewer has some doubt concerning the correctness of the theoretical foundation of Professor Hall's propositions concerning "mens rea," especially since, as intimated before, they seem to amount to a theory of natural law in the original meaning of that term and thus to a nowadays obsolete approach. However, treating the matter not from a theoretical angle, but with a view to a proper judicial and legislative policy regarding criminal liability, it would seem

3. Pp. 116-17; note 31.

4. METZGER, STRAFRECHT 341 (3d ed. 1949); WELZEL, DAS DEUTSCHE STRAFRECHT 39 (1947).

5. For the different distinction between *dolus eventualis* and *dolus indirectus* in the theory of Austrian criminal law, see Koessler, *op. cit. supra* note 2, at 113-14, also notes 38-41.

6. Since 1956 not including California. See *People v. Vogel*, 46 Cal. 2d 798, 299 P.2d 850 (1956). Generally see PERKINS, CRIMINAL LAW 835-40 (1957).

7. Professor Hall does not mention the "reasonable man" test in provocation to homicide, where it is highly questionable on the same ground. See Koessler, *op. cit. supra* note 2, at 135-38.

8. Koessler, *op. cit. supra* note 2, at 114-19.

9. In this connection see also PERKINS, *op. cit. supra* note 6, at 692-710.

that Professor Hall stands on solid ground in criticizing the dispensation from the requirement of "mens rea" in certain offenses treated as criminal even where this amounts to strict liability. It is believed, however, at variance with Professor Hall's view, that this should not go so far as to exclude criminality for negligent acts or omissions, where the legislature considers it as necessary in the public interests to apply criminal law sanctions to certain merely negligent misconducts. It is, on the other hand, believed that only recklessness of the kind characterized by German scholars as *dolus eventualis*, where a party foreseeing the possibility of harm, though not intending it, does not care if it results should, as a matter of sound policy of criminal law, be treated as tantamount to intention. The second kind of recklessness, where the perpetrator foresees the possibility of the harm but acts under the assumption that it will not materialize, should be considered as merely a higher degree of negligence.

While considerations of space prohibit further coverage of the rich contents of this book, it should be mentioned that it is particularly valuable, and valuable for the practitioner as well as the man of theory, where it deals with what Professor Hall calls "doctrines," and where he, for instance, in a most interesting way, analyzes and states his own theory regarding the conception of impossibility in criminal attempt.

It is partly due to the subject of this study, partly to the author's erudite style, that the book is not easy to read, and not always easy to understand. However, the effort spent on perusing it is well compensated by the thought inspiring effect it exercises. It certainly deserves to be included in every better class library of criminal law or criminology.

MAXIMILIAN KOESSLER*

SELECTED PROBLEMS IN THE LAW OF CORPORATE PRACTICE. Edited by Thomas G. Roady, Jr. and William R. Andersen.¹ Nashville: Vanderbilt University Press, 1960. Pp. viii, 423. \$10.00.

This selection of articles and materials bearing on the law of corporate practice is admirably suited to serve its declared purpose—to provide a collection "for the benefit of corporate officials and corporation counsel who need a scholarly treatment of some of the matters of primary concern to them today." However, it will have wider appeal. Those not necessarily classified as corporate officials and corporation counsel, such as the general practitioner and tax counsel, will find this selection an informative and rewarding experience.

The compilers of this book admittedly have not attempted to cover the entire field of legal problems in which corporations are involved. Nevertheless, upon the completion of this volume the reader is aware that the field is extensive. Very

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1. The editors are members of the faculty of the Vanderbilt University School of Law.

appropriately the first article, the author of which is Professor Miguel A. de Capriles, presents a fifteen-year survey of corporate developments, from 1944 to 1959. The significant statement is made that "there is some evidence that the number of persons who have a proprietary stake in the corporate system through direct shareholding or indirectly through pension funds, insurance, annuities, etc., has been growing faster than the population as a whole." Among other subjects, the article touches on the tremendous growth of interest in the special problems of close corporations and points out that some legal writers have raised the plea for wider legislative recognition of the differences between close corporations and public-issue corporations. Professor de Capriles sees, during the survey period, self-imposed improvement in standards of corporate management, but expresses the opinion that it "cannot be said that substantial progress has really been made toward a 'socially responsible' capitalism."

Brought together here are fourteen different selections or studies representing the works of fifteen different contributors. With the exception of "State Taxation of Income From a Multistate Business" by Professor Paul J. Hartman, which contains 108 pages, the articles do not exceed approximately thirty pages each. The reader is immediately conscious of the fact that Professor Hartman is not extravagant with space when the scope and complexity of his subject is discerned. In readable fashion he covers an analysis of the tax structure of the fifty states, presenting a picture of the various facets of taxation of corporate net income and gross income. There is a stimulating discussion of the problem, of effectively coordinating taxes and balancing the competing tax demands of the states and freedom of commerce and trade across state borders in a federal system of government, with the suggested roles to be played by the Supreme Court and Congress. The *Northwestern-Stockham* decision² and the "uproar" the decision touched off resulting in action by Congress in passing Public Law 86-272, which was signed by the President on September 14, 1959,³ are given a detailed analysis. Professor Hartman points out that, although Public Law 86-272 curtails, at least in a limited way, the *Northwestern-Stockham* decision and provides for studies by the House Judiciary Committee and the Senate Finance Committee of state taxation of income derived from interstate commerce for the purpose of proposing legislation providing uniform standards to be observed by the states in imposing income taxes on income from interstate commerce, there is a need for these committees, or others, to give attention to a "much more comprehensive examination of the tremendously important, but equally vexatious, problems of all the major facets of state taxation of interstate commerce."⁴

Professor Boris I. Bittker gave the reviewer the feeling of being led by an

2. *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959) (two cases).

3. 73 Stat. 555.

4. Since publication of "Selected Problems" the President has signed Public Law 87-17 amending Public Law 86-272 to provide for studies of "all matters" pertaining to the taxation of interstate commerce by the States.

able hand through the "extraordinary statutory gyrations" pertaining to the tax treatment of collapsible corporations. In two articles by Mortimer M. Caplin on Subchapter S of the Internal Revenue Code, pertaining to tax-option corporations, one is reading the scholarly work of an individual who, since publication, has become Commissioner of Internal Revenue. Interestingly enough, Professor Caplin has the following to say about Subchapter S:

. . . Despite only one year's experience under these provisions, Congress would be justified in striking it from the Code as bad law, not worthy of retention even in modified form.

There may be a desire, however, for continued efforts to draft a statute which would effectively permit 'small' businesses to select forms of organization 'without the necessity of taking into account major differences in tax consequences.' If this pressure exists, subchapter S should be brought as close to partnership taxation as is possible. . . .

In a workmanlike way the author then proceeds to outline possible remedial legislation.

An authority on the subject matter, Walter W. Brudno, presents "Tax Considerations in Selecting a Form of Foreign Business Organization" in an article which does not purport to describe or analyze the provisions of the Internal Revenue Code, rulings, and cases in this field, but rather aims to lay down "the basic criteria to guide in designing a structure for the conduct of a particular foreign enterprise." Mr. Brudno distinguishes between the form in which a business is conducted and the method by which it is conducted and issues the warning applicable in other fields of tax considerations that, "A form of operation which results in uneconomic distortion of normal business procedures may delight the tax theoretician but it will hardly satisfy his client."

In "Initial Capitalization and Financing of Corporations," Chester Rohrlach discusses the function of the capitalization of a business and covers such subjects as methods of financing, allocation between equity capital and debt, par and no-par stock, preferred stocks, and bonds and debentures. Thorough papers by Arthur M. Kriedmann and Professor Edward R. Hayes are respectively entitled "The Corporate Guaranty" and "Extent of the Legislature's Reserve Power to Change Common Law Attributes of Corporations." Mr. Kriedmann's article on "The Corporate Guaranty," among other points, discusses the defense of ultra vires, statutes making no specific mention of a corporation's power to guarantee, statutes expressly empowering a corporation to act as a guarantor, and statutes abolishing the defense of ultra vires.

A fascinating subject is dealt with by Thomas R. Hunt under the title "Corporate Law Department Communication—Privilege and Discovery." The author analyzes the attorney-client privilege and the newer "work-product" concept, as they apply to house counsel. He concludes that corporate law department communications are exempt from compulsory disclosure under essentially the same conditions currently applicable to communications generally. He points out that it has been broadly accepted that house counsel and outside counsel are essentially

alike, but that "there is a difference; where nonlegal functions are predominant, house counsel cannot claim true professional status."

In three commendable studies, Charles W. Steadman presents major concepts in the field of incentive compensation, Jack D. Edwards gives a searching analysis of the taxation of stock options, and James F. Neal covers deferred compensation plans from the standpoint of what he terms qualifying for non-qualified treatment.

The materials and studies by professors, practicing attorneys, and corporation counsel contained in this book, in the opinion of this reviewer, are well selected. The footnotes, citations, and references to source materials are plentiful. In the concluding work by Professor F. Hodge O'Neal and his research associates, Jordan Derwin and C. Edwin Chapman, Jr., there is a study of new books and materials on corporation law and practice published in the United States since mid-1956, which adds to the purpose and quality of the book.

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